Supreme Court, U.S.
FILED
MAY 6 1992
OFFICE OF THE CLERK

91-2028

No. _____

In The

Supreme Court of the United States

October Term, 1991

BRENDA JONES, Individually and
As Administratrix of the
Estate of EVAN A.M. JONES,
Deceased,

Petitioner,

vs.

PETTY-RAY GEOPHYSICAL GEOSOURCE, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN DISMISSING PETITIONER'S APPEAL BECAUSE OF AN EXCUSABLE AND EXPLICABLE FAILURE TO FILE THE APPELLANT'S BRIEF WHEN NOTIFICATION WAS SENT TO TRIAL COUNSEL INSTEAD OF APPELLATE COUNSEL.

II. WHETHER THIS COURT UNDER ITS SUPERVISORY POWERS SHOULD REVERSE THE DISMISSAL OF PETITIONER'S APPEAL BECAUSE OF AN EXCUSABLE AND EXPLICABLE FAILURE TO FILE THE APPELLANT'S BRIEF WHEN NOTIFICATION WAS SENT TO TRIAL COUNSEL INSTEAD OF APPELLATE COUNSEL.

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No. _____

In The

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October Term, 1991

BRENDA JONES, Individually and
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vs.

PETTY-RAY GEOPHYSICAL GEOSOURCE, ET AL.,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BRENDA JONES, Individually and As Administratrix of the Estate of EVAN A.M. JONES, Deceased, Petitioners herein, by and through her appellate attorneys of record, CHARLES LOUIS ROBERTS and JAMES F. SCHERR, hereby petitions this Court to grant a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The denial of rehearing en banc by the United States Court of Appeals for the Fifth Circuit in *Brenda Jones, Individually and As Administratrix of the Estate of EVAN A.M. JONES, Deceased,* No. 91-2476 was entered on February 6, 1992; and this Order is reproduced herein as App. 6a. There was no Opinion of the panel in this case. The Order dismissing appeal is reproduced herein as App. 1a. The Issuance of Mandate is reproduced herein as App. 3a. The Order denying Motion to Reinstate appeal is reproduced herein as App. 5a. The Notice to Counsel is reproduced herein as App. 7a.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on February 6, 1992. This Petition is timely filed within ninety (90) days of February 6, 1992, pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 42.3 of the United States Court of Appeals for the Fifth Circuit reads as follows in pertinent part:

> **42.3** ***Dismissal for Failure to Prosecute:***
>
> 42.3.1 In direct criminal appeals . . . the following action shall be taken if appellant fails to file

a brief or otherwise fails to comply with rules requiring processing the appeal to hearing:

3.1.1 *Appeals with counsel.* If appellant is requested by counsel, appointed or retained, the Clerk shall issue a notice to counsel that, upon expiration of 15 days from the date thereof, the appeal may be dismissed for want to prosecution unless prior to that date the default is remedied, and shall enter an order directing counsel to show cause within 15 days from the date thereof why disciplinary action should not be taken against counsel. If the default is remedied within that time the Clerk shall not dismiss the appeal and may refer to the Court the matter of disciplinary action against the attorney. If the default is not remedied within that time the Clerk may enter an order dismissing the appeal for want of prosecution or may refer to the Court the question of dismissal.

Rules of the United States Court of Appeals for the Fifth Circuit.
Loc.R.42.3.1 (3.1.1)

STATEMENT OF THE CASE

In a full explanation of the facts, the Petitioner would present the following: This is a death case involving a widow, BRENDA JONES, as a Plaintiff and Appellant and Petitioner here. This was the third appeal before the United States Court of Appeals for the Fifth Circuit wherein Ms. JONES is in the role of Appellant and Mr. CHARLES LOUIS ROBERTS was lead appellant counsel (and notification counsel). All of these appeals (90-2093, 90-2533 and 91-2476) involve the same lawsuit out of the

United States District Court in Houston where Mr. JAMES SCHERR is trial counsel. These appeals are: (1) *JONES v. TOTAL EXPLORATION, TOTAL SOUDAN, and TOTAL COMPAGNIE FRANCIS DES PETROLES,* No. 90-2093; (2) *JONES v. PETTY RAY GEOPHYSICAL, GEOSOURCE, INC., et al., TOTAL EXPLORATION; TOTAL SOUDAN, and TOTAL COMPAGNIE FRANCIS DES PETROLES,* No. 90-2533; and, (3) *JONES v. PETTY-RAY GEOPHYSICAL DIVISION OF GEOSOURCE, INC., GEOSOURCE, INC., and MARATHON PETROLEUM SUDAN, LTD.,* No. 91-2476. The fact that there were three (and now two) appeals is the result of Summary Judgment and appeal certification procedures on the part of the trial court, rather than the result of any calculated effort on the part of Ms. JONES. One of these appeals has recently been decided: *JONES v. PETTY RAY GEOPHYSICAL, GEOSOURCE, INC., et al., TOTAL EXPLORATION; TOTAL SOUDAN, and TOTAL COMPAGNIE FRANCIS DES PETROLES,* No. 90-2533. The other appeal was voluntarily dismissed by Mr. ROBERTS after he received the record and noticed that it was not properly certified for interlocutory appeal. As we will see, the multiplicity of appeals was a factor contributing to the confusion in this appeal.

The preparation of the record in this case took an abnormally long time (due also to the multiplicity of appeals) (*See Docket Sheet*). This delay of several months tended to place this appeal in limbo. Initially, a request for the record was made by the office of Mr. ROBERTS prior to the filing date. Unfortunately, Mr. ROBERTS' office assumed that he would be notified upon completion of the record inasmuch as he was lead/notification

counsel in the two prior appeals, and his office was communicating with the clerk.

However, notification that the record was filed and the brief was due was sent to Mr. JAMES SCHERR, trial counsel and only Mr. SCHEER. (*See Notice to Counsel, App. 10a*). Mr. ROBERTS was unaware whether a copy of such notice was received before notification of the dismissal. Counsel's secretary related that she made exhaustive searches of files and could not find any indication that such notice was received. Mr. SCHERR abruptly sent in an appearance form that listed Mr. ROBERTS as lead/notification Counsel. This document was primarily a method of communication to the Court that "this is the one to notify." Even though the record had been requested and the Court had been notified that Mr. ROBERTS was going to prepare Appellant's brief, the record was not transmitted to him. This is all the more curious because the letter from the Clerk's office notifying Mr. SCHERR of the due date for the brief implicitly acknowledges that a request for transmittal had been made. Indeed, the Clerk's letter says as much in the following statement: "The Record on Appeal cannot be sent until your appearance of counsel form has been filed" (*See Motion to Reinstate, Notification of Due Date*). However, as we know, the Clerk's office did not transmit the record to lead/notification counsel listed on the appearance. Instead, the Clerk's office for the United States Court of Appeals for the Fifth Circuit waited for the due date to pass and the Clerk's office summarily dismissed the appeal, (*See Order Dismissing appeal, App. 1a*). This was done without notice of intent to dismiss, or any opportunity to correct the default. Thus, the first

notice lead/notification counsel received was a dismissal notice, with a notice that the record was being transmitted not to Counsel, but back to the District Clerk (*See Order Dismissing Appeal, App. 1a*). As previously noted, this *Notice of Issuance of Mandate,* App. 3a was also indicative that the Clerk's office ***had retained*** the record and transcripts in spite of the admitted request that they be submitted to counsel so that he could use them to prepare a brief. That *Notice* indicates clearly that the Clerk's office is transmitting a full ten (10) volumes of record and an envelope of Exhibits back to the District Clerk, (*See Notice of Issuance of Mandate, App. 3a*).

After receiving the notification of dismissal, Counsel timely filed a *Motion to Reinstate* which included affidavits of his staff that stated the record nor the notification of a due date as to the brief was received by his office. As previously indicated, the notice inadvertently sent to trial counsel, JAMES F. SCHERR, acknowledged that a request for the record had been made. Also, the notice of issuance of mandate which accompanied the Order dismissing appeal indicated that the Clerk's office had retained ten (10) volumes and one (1) envelope. It was hardly possibly that Mr. ROBERTS' office could have overlooked ten (10) volumes and the fact that the Clerk's office still retained those ten (10) volumes indicated that they were not transmitted to him in spite of the request. Had they been transmitted to him they would have, of course, given him notice that a brief was due.

This *Motion to Reinstate* was denied and Counsel filed a further *Petition for Rehearing En Banc* which again detailed his situation as having failed to receive the record or notification. This *Motion for Rehearing* included

copies of Counsel's calendar which indicated that unlike many other State and Federal appeals, this Appeal was not docketed so as to give the due date for filing the Appellant's Brief. Furthermore, the Appellee in its response was unable to demonstrate any prejudice save the passage of a short amount of time and its failure to gain a procedural dismissal. The United States Court of Appeals was fully aware that had counsel known about the brief he could have requested a short extension to file such brief and such extension would have been granted.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE COURT OF APPEALS ERRED IN DISMISSING PETITIONER'S APPEAL BECAUSE OF AN EXCUSABLE AND EXPLICABLE FAILURE TO FILE THE APPELLANT'S BRIEF WHEN NOTIFICATION WAS SENT TO TRIAL COUNSEL INSTEAD OF APPELLATE COUNSEL.

II. THIS COURT UNDER ITS SUPERVISORY POWERS SHOULD REVERSE THE DISMISSAL OF PETITIONER'S APPEAL BECAUSE OF AN EXCUSABLE AND EXPLICABLE FAILURE TO FILE THE APPELLANT'S BRIEF WHEN NOTIFICATION WAS SENT TO TRIAL COUNSEL INSTEAD OF APPELLATE COUNSEL.

In this case, the Petitioner's appeal was dismissed for a procedural default. This dismissal was accomplished by an Order from the Clerk's office signed by a Deputy Clerk which was issued without notice or any opportunity to correct the default. The effect of the dismissal was to uphold a *Summary Judgment* granted against her in

the United States District Court below. Because of this, she has not had a fair opportunity to litigate her case which is based on the wrongful death of her husband.

The Petitioner admits that her brief was not timely filed. However, she demonstrated below that such default was occasioned by the Clerk's office of the United States Court of Appeals for the Fifth Circuit notifying ***trial counsel*** instead of appellate counsel and by the failure of the same Clerk's office to transmit the record and retransmit the brief due date notice to ***appellate*** counsel. Because of this confusion, the Appellant's brief was not timely filed. This was a default; however, it was neither intentional, nor inexplicable, nor accompanied by real prejudice to the adverse party. Indeed, the adverse party indicated only the passage of a small amount of time (in a case which had been in litigation for several years) together with its loss of the procedural dismissal itself, (See Appellee's Response) Such prejudice does not suffice as real prejudice, *Marcaida v. Rascoe*, 569 F.2d 828 (5th Cir. 1978).

In asking this Court to hear this case, the Appellant advances two grounds, *first*, that this Court has supervisory authority over the federal courts of appeal in regard to such critical procedural processes such as a summary dismissal of an ongoing appeal. *Second*, that the circuits are in conflict as to whether such a procedural default warrants the extreme sanction of dismissal when a rational and excusable explanation is submitted and where the adverse party cannot show real prejudice.

A. Supervisory Power and Responsibility.

This Court has clear supervisory authority and responsibility over the inferior federal courts, including the Courts of Appeal. This especially applies to critical procedures such as summary dismissals and to rules authorizing such summary dismissals such as Fifth Circuit Local Rule No. 91-2476 which authorizes the Clerk's office to summarily dismiss appeals without notice for procedural default. *See Frazier v. Heebe*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.557 (1987); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987).

B. Conflict of Authority.

Several of the United States Courts of Appeal, including the Fifth Circuit, have issued holdings that deny the extreme sanction for dismissal on the grounds of non-jurisdictional procedural defaults such as the untimely filing of the Appellate brief. For example, the Second Circuit has held:

> On May 19, 1966, Edwards' appeal was dismissed for failure to file his brief and appendix in accordance with the schedule previously set down by this court. On June 20, 1966, Edwards moved to vacate the dismissal, citing unusual circumstances which prevented his attorney from devoting his time to this case. Because of these circumstances, we vacated the dismissal of Edwards' appeal, accepted a belatedly filed

brief (to which the government has responded) and considered Edwards' appeal on the merits.

United States v. Edwards,
366 F.2d 853, 857 n.1 (2nd Cir. 1966)

And the Sixth Circuit has held:

> The rules cited by Appellee are stated in permissive, rather than mandatory language. We are not required to dismiss every appeal which does not meet each of the time limitations in the above-stated rules. *See* with regard to Rules 11 and 12, *Federal Rules of Appellate Procedure, Black v. United States,* 269 F.2d 38 (9th Cir. 1959) cert. denied 361 U.S. 938, 80 S.Ct. 379, 4 L.Ed.2d 357; *United States v. Bowen,* 310 F.2d 45 (5th Cir. 1962); *Watley v. United States,* 221 F.2d 476 (5th Cir. 1955). See with regard to Rule 3, *Federal Rules of Appellate Procedure, Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 524 v. Billington,* 402 F.2d 510 (9th Cir. 1968); *United States v. Edward,* 366 F.2d 853 [857 n.1] (2nd Cir. 1966) cert. denied 386 U.S. 908, 87 S.Ct. 852, 17 L.Ed.2d 782; *Phillips v. Employers Mutual Liability Ins. Co. of Wisconsin,* 239 F.2d 79 (5th Cir. 1956).
>
> ***King v. Laborers Internat. U. of No. America, U.L. No. 818,***
> **443 F.2d 273, 276 (6th Cir. 1971)**

And even the Fifth Circuit has previously held:

> We pretermit discussion of the jurisdictional issued raised by appellee's motion to dismiss for appellant's late filing of the record and brief on appeal. Exercising the board discretion vested in this Court by Rule 73(a), *Federal Rules of Civil Procedure,* 28 U.S.C.A., we simply hold that

> appellant's failure in these respects to show strict compliance with Rule 73(g) and this Circuit's Rule 24, 28 U.S.C.A., are at most nonjurisdictional defects in the prosecution of his appeal, which we consider insufficient to warrant dismissal. *See Martin v. Handy-Andy Community Stores of Texas,* 5 Cir., 214 F.2d 10, 11; *Columbia Lumber Co. v. Agostino,* 9 Cir. 184 F.2d 731, 733; *cf. Fong v. James W. Glover, Ltd.,* 9 Cir. 197 F.2d 710, 712.
>
> ***Phillips v. Employers Mutual Liability Ins. Co. of Wis.,***
> **239 F.2d 79, 80 n.2 (5th Cir. 1956)**

And also:

> This court is not required to dismiss every appeal which does not meet the time limitations of Rule 31. In *Phillips v. Employers Mut. Liability Ins. Co.,* 239 F.2d 79, 80 n.2 (5th Cir. 1956), the court said that the late filing of briefs is "at most [a] nonjurisdictional [defect] in the prosecution of [t]his appeal, which we consider insufficient to warrant dismissal." See also *King v. Laborers Internat'l Union,* 443 F.2d 273 (6th Cir. 1971); *United States v. Edwards,* 366 U.S. 908, 87 S.Ct. 852, 17 L.Ed.2d 782 (1967); *cf. Walker v. Mathews,* 546 F.2d 814 (9th Cir. 1976) (late filing of record).
>
> ***Marcaida v. Rascoe,***
> **569 F.2d 828, 830 (5th Cir. 1978)**

In his *Motion to Reinstate,* Appellate counsel pledged to file his brief within fifteen (15) days of receipt of the record, without extension *(See Original Motion to Reinstate).* Also, the calendars of October, November, December, etc., reveal that counsel has filed a score of appellate

briefs, rehearings, Writ for Petition of Certiorari, Petitions for Discretionary Review, etc., in the United States Supreme Court, several U.S. Courts of Appeals, Texas Courts of Appeal and the Texas Court of Criminal Appeals.

On the other hand, several circuits have adopted stricter, invariable standards in favor of dismissal, *Stotler and Co. v. Able*, 837 F.2d 1425 (7th Cir. 1988) and *Barber v. American Sec. Bank*, 841 F.2d 1159 (C.A.D.C. 1988). The Petitioner asserts that these conflicts are significant and worthy of consideration by this Court because this procedure of summary dismissals is not only a critical subject which directly concerns the functioning of the judiciary, *Young, supra*, but is one that recurs often.

C. Argument on the Merits

In this case, Notice that the briefing schedule was sent to trial counsel instead of appellate counsel and that trial counsel instead of notifying appellate counsel filled out an appearance form with appellate counsel as the persons to notify. However, the Court of Appeals did not notify appellate counsel nor did it submit the record as previously requested. The first indication that something was amiss was the notice of dismissal which unlike the other documents was transmitted to appellate counsel. Appellate counsel informed the Court that he had not been notified and supplied sworn affidavits to that effect attached to his *Motion to Reinstate*. To Counsel's knowledge, no contrary affidavits were received. Counsel contends under these circumstances it was unjust and an

abuse of discretion to dismiss Petitioner's appeal particularly under the circumstances where this appeal was from a Summary Judgment out of a District Court case in which other summary judgments had been certified and appealed previously with briefs filed, etc. Counsel believes this Court should not only reverse this decision but issue a standard which should be that of abuse of sound discretion instead of arbitrary or absolute discretion. Counsel believes that this Court's consideration and resolution of this matter would aid the administration of justice in the federal court of appeals.

CONCLUSION AND PRAYER

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Petitioner prays that this Court grant a Petition for Certiorari to the United States Supreme Court and thereafter reverse the dismissal of her appeal in the United States Court of Appeals for the Fifth Circuit and remand this cause with instructions to reinstate this appeal.

Respectfully submitted,

CHARLES LOUIS ROBERTS
Attorney for Petitioner
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109 N. Oregor., Suite 1400
El Paso, Texas 79901
(915) 532-5475

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2476

BRENDA JONES, Individually and
as Administratrix of the
Estate of Evan A.M. Jones,
Deceased,

Plaintiff-Appellant,

versus

PETTY-RAY GEOPHYSICAL
GEOSOURCE, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

(Filed Nov. 27, 1991)

CLERK'S OFFICE:

Pursuant to Local Rule 42.3, the appeal was duly entered dismissed for want of prosecution for failure of appellant to file brief within the time fixed by the rules, this 27th day of November, 1991.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: M. A. Lopiparo
Deputy Clerk

FOR THE COURT – BY DIRECTION

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

November 27, 1991

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

Jesse E. Clark, Clerk
U S District Court
515 Rusk Ave., Rm. 5300
Houston,TX 77002

No. 91-2476 JONES v. PETTY-RAY
EP 86 2179

XXX Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

___ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

___ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

___ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying Certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

___ We have received a certified copy of an order of the Supreme Court denying certiorari in the above

cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

____ Copy of the Court's opinion.

XXX Original record on appeal or review. 10 Volumes.

XXX Other original papers forwarded with record.___ Envelope 1 Box.

____ Bill of Costs approved by this Court. ___ Copy enclosed to counsel.

cc w/encl:

Mr. Charles Roberts
Mr. Edward Hennessy
Mr. Jon David Ivey

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By: M. A. Lopiparo
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2476

BRENDA JONES, Individually and
As Administratrix of the
Estate of EVAN A.M. JONES,
Deceased,

Plaintiff-Appellant,

versus

PETTY-RAY GEOPHYSICAL
GEOSOURCE, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

(Filed Jan. 8, 1992)

ORDER:

IT IS ORDERED that appellant's motion to reinstate the appeal is DENIED.

/s/ Rhesa H. Barksdale
UNITED STATES CIRCUIT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2476

BRENDA JONES, Individually and
As Administratrix of the
Estate of EVAN A.M. JONES,
Deceased,

Plaintiff-Appellant,

versus

PETTY-RAY GEOPHYSICAL
GEOSOURCE, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion none , 5 Cir., 198_, __F.2d__)

(February 6, 1992)

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:

(✔) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc

(Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2093

BRENDA JONES, Individually and
as Administratrix of the
Estate of EVAN A.M. JONES,
Deceased,

Plaintiff-Appellant,

versus

PETTY-RAY GEOPHYSICAL
GEOSOURCE, INC., ET AL.,

Defendants,

TOTAL EXPLORATION, TOTAL SOUDAN,
and TOTAL COMPAGNIE FRANCAIS DES PETROLES,

Defendants-Appellees.

No. 90-2533

BRENDA JONES, Individually and as
Administratrix of the Estate
of EVAN A.M. JONES, Deceased,

Plaintiff-Appellant,

versus

PETTY-RAY GEOPHYSICAL GEOSOURCES, INC.,
ET AL.,

Defendants,

TOTAL EXPLORATION, TOTAL SOUDAN, and
TOTAL COMPAGNIE FRANCAIS DES PETROLES,

Defendants-Appellees.

No. 91-2476

BRENDA JONES, Individually and
as Administratrix of the
Estate of EVAN A.M. JONES,
Deceased,

Plaintiff-Appellant,

versus

PETTY-RAY GEOPHYSICAL
GEOSOURCE, INC., ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

(Filed Feb. 5, 1992)

ORDER:

IT IS ORDERED that appellant's reurged motion to reinstate cause number 91-2476 and to transfer that cause to the panel in No. 90-2093 is DENIED.

IT IS FURTHER ORDERED that appellant's motion to consolidate the above appeals is DENIED. (appellant dismissed her appeal in No. 90-2533 in February 1991).

/s/ Rhesa H. Barksdale
United States Circuit Judge

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

ALBERT F. GANUCHEAU
CLERK

TEL. (504) 589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

October 1, 1991

Mr. James F. Scherr
Attorney at Law
1 Texas Tower
109 N. Oregon
El Paso, TX 79901

No. 91-2476 BRENDA JONES v. PETTY RAY GEOPHYSICAL EP 86 2179

Briefing Notice. Pursuant to FRAP 12 you are hereby notified that the record on appeal has been filed. The brief for appellant and record excerpts are now due within forty (40) days from this date. Enclosed is a checklist of rule requirements for preparation and filing of briefs and record excerpts.

Policy on Extensions. The Court is prepared to consider cases on the merits promptly after briefs are filed. However, the Court will not know if the case requires oral argument until all briefs are filed. So, a delay in briefing is a delay in calendaring. For these reasons, we are under instructions from the Court that where extensions are requested they are to be sparingly given and only for good cause. The ordinary busyness of counsel is not considered good cause. Failure to have access to the record will not be considered grounds for extending the

time. Whether opposing counsel does not object has no bearing on our determination to grant an extension.

Reply Brief. Cases are forwarded to the Court immediately upon filing of appellee's brief. Reply briefs must be filed within the 14 day period fixed by the rules.

Dismissal of Appeals. Local Rule 42.3.2 allows the Clerk to dismiss appeals without notice if the brief is not timely filed.

✓ The Record on Appeal cannot be sent until your appearance of counsel form has been filed.

Very truly yours,

GILBERT F. GANUCHEAU,
CLERK

By M. A. Lopiparo
Deputy Clerk

cc w/encls.:

All Counsel of Record

91-2028

(2)

Supreme Court, U.S.
FILED
JUN 10 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1991

BRENDA JONES, Individually and
As Administratrix of the
Estate of EVAN A.M. JONES, Deceased,

Petitioner,

vs.

PETTY-RAY GEOPHYSICAL, DIVISION OF
GEOSOURCE, INC., GEOSOURCE, INC., AND
MARATHON PETROLEUM SUDAN, LTD.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR MARATHON PETROLEUM SUDAN, LTD. IN OPPOSITION

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June 10, 1992

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QUESTION PRESENTED

1. Whether the court of appeals properly dismissed Petitioner's appeal for want of prosecution for failure to file her brief in a timely manner.

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No. _____

In The

Supreme Court of the United States

October Term, 1991

BRENDA JONES, Individually and
As Administratrix of the
Estate of EVAN A.M. JONES, Deceased,

Petitioner,

vs.

PETTY-RAY GEOPHYSICAL, DIVISION OF
GEOSOURCE, INC., GEOSOURCE, INC., AND
MARATHON PETROLEUM SUDAN, LTD.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR MARATHON PETROLEUM SUDAN, LTD. IN OPPOSITION

OPINIONS BELOW

The Order dismissing appeal is reproduced at Pet. App. 1a.

JURISDICTION

The Order dismissing Petitioner's appeal in the United States Court of Appeals for the Fifth Circuit was

entered November 27, 1991. Pet. App. 1a. The Order denying Motion to Reinstate Appeal was entered January 8, 1992. Pet. App. 5a. Petition for Panel Rehearing was denied on February 6, 1992. Pet. App. 6a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Local Rule 42.3.2 of the United States Court of Appeals for the Fifth Circuit reads as follows:

42.3 Dismissal for Failure to Prosecute

> 42.3.2 In all other appeals when appellant fails to order the transcript or fails to file a brief or otherwise fails to comply with the rules of the court, the clerk shall enter an order dismissing the appeal for want of prosecution.

5th Cir. R. 42.3.2.

The rule cited by Petitioner, 5th Cir. R. 42.3.1, at Pet. 2-3, concerns direct criminal appeals, *habeas* cases, and cases filed pursuant to 28 U.S.C. § 2255. It does not concern suits for civil damages such as the one at issue.

STATEMENT OF THE CASE

This is an appeal from a dismissal of Petitioner Brenda Jones' ("Jones" or "Petitioner") appeal for failure to file her brief pursuant to Fed. R. App. P. 31 and 5th Cir. R. 42.3.2. Rule 42.3.2. instructs the clerk to enter an order dismissing an appeal for want of prosecution when a

party fails to file his brief within the time allowed. Petitioner argues that the court abused its discretion in dismissing her appeal because one of her two attorneys of record did not receive notice of the briefing deadlines.

The record reveals that Jones' counsel of record, James Scherr ("Scherr"), received actual notice of the due date for Appellant's brief. Pet. App. 10a-11a. That notice also included the Fifth Circuit's policy regarding extensions of time for filing briefs and specified that Rule 42.3.2 allows the clerk to dismiss appeals without notice if the appellant's brief is not filed timely. Through negligence or indifference, Jones' counsel never filed a brief, and the court of appeals correctly dismissed the appeal.

The record reveals that Scherr, rather than Roberts, acted as Jones' appellate counsel. Scherr filed a Notice of Appeal for Jones on April 30, 1991. Scherr later sent a letter dated May 10, 1991, to the clerk of the Fifth Circuit transmitting a certified copy of the Notice of Appeal. On May 14, 1991, Scherr completed a transcript order form to the clerk of the Fifth Circuit and to the clerk of the Southern District of Texas. Also, on May 14, 1991, Scherr mailed a letter to Ms. Janice Helstrom and Ms. Mary Hagbee, court reporters for the district court, requesting preparation of a transcript and a statement of facts. These two individuals received additional letters from Scherr concerning the transcript on May 23, 1991. Letters from Scherr dated June 4, 1991, enclosed a copy of the original Transcript Order to the clerk of the Fifth Circuit. The Appellant filed her Praecipe on June 11, 1991, by Scherr. Although Jones asserts that Scherr acted only as her "trial" counsel, the record reveals otherwise.

On October 1, 1991, the clerk of the Fifth Circuit sent a notice to Scherr, with copies to counsel for appellees, notifying the parties of the briefing schedule. Pet. App. 10a-11a. The notice stated that Appellant's brief and record excerpts were due forty days from October 1. The clerk also specified that he could not send the record on appeal until Scherr filed an Appearance of Counsel form. In addition, the clerk provided notice to Scherr that Rule 42.3.2 allows the clerk to dismiss appeals without notice if the Appellant's brief is not filed timely. The notice also stated that failure to have access to the record would not be considered grounds for extending the time to file Appellant's brief.

An Appearance of Counsel form designating Mr. Charles Louis Roberts *and* Scherr as counsel for Appellant was filed on October 4, 1991. Roberts' telephone number and Social Security number were omitted from the form. Scherr's telephone number and Social Security number were provided. Jones does not allege that Scherr failed to receive the October 1, 1991, briefing notice or that he was unaware of the briefing schedule. The only allegation of lack of notice concerns Scherr's co-counsel, Roberts.

By way of proving that Roberts was her "appellate" counsel, Jones asserts that Roberts sent a letter to the clerk requesting the record. There is no evidence of this request in the court of appeals' records. Even if there were, Roberts had not entered an appearance prior to the notice of the briefing schedule sent by the clerk on October 1, 1991, and the clerk was under no obligation to send the record to anyone who had failed to file an Appearance of Counsel.

After October 4, 1991, neither Scherr nor Roberts ever communicated with the court. Although Jones alleges Roberts was waiting for the record, there is no record of any effort by Jones to determine why the record had not been mailed. This indifference on Roberts' part resulted in the failure to file a brief on November 11, 1991. Further, the October 1, 1991, briefing notice from the clerk of the Fifth Circuit to Jones specified (in bold type) that failure to have access to the record will not be considered grounds for extending the time to file the Appellant's brief.

On November 27, 1991, the clerk of the United States Court of Appeals for the Fifth Circuit entered a dismissal of the appeal for want of prosecution pursuant to 5th Cir. R. 42.3.2. A Motion to Reinstate, a Petition for Rehearing *En Banc* and a Motion for Rehearing were all denied. Pet. App. 5a-9a.

ARGUMENT

1. Marathon acknowledges that this Court has clear supervisory authority and responsibility over the inferior federal courts and may decide the propriety of the local rules of the courts of appeal. *Frazier v. Heebe*, 482 U.S. 641, 107 S. Ct. 2607, 96 L.Ed. 557 (1987). This case does not warrant the Court's granting certiorari because Fifth Circuit rule 42.3.2 is justified by jurisprudential considerations of dismissing an appeal where the appellate rules have not been observed.

The principal of consistent and mutual respect for the supremacy of rules in our system of law counsels for

sanctions against a participant who fails to abide by those rules without good cause. In *Kushner v. Winterthur Swiss Insurance Co.*, 620 F.2d 404 (3rd Cir. 1980), the court stated:

> Each appellant in this court must of necessity allege that the district court violated some rule of substantive or procedural law . . . the litigant, then, who charges that the rules were not followed in the district court should himself follow the rules when he applies for relief in this court. Sauce for the goose is sauce for the gander.

Winterthur, 620 F.2d at 407.

Clearly, jurisprudential considerations support the court of appeals' use of its local rules to sanction litigants who fail to observe its rules.

2. Petitioner claims that there is a conflict among the circuits concerning dismissal of appeals for failure to comply with federal and local rules. Pet. 9-12. This is not true. Rule 31 of the Federal Rules of Appellate Procedure provides that the appellant shall file a brief within forty days after the date that the record is filed. Failure to file a brief on time is not a jurisdictional bar to hearing the appeal. *Marcaida v. Rascoe*, 569 F.2d 828 (5th Cir. 1978). However, failure to file a brief on time may provide the cause for summary disposition of the appeal in *the court's discretion*.

In addition, the Fifth Circuit's rules provide sanctions for a party's failure to adhere to the Federal Rules of Appellate Procedure. Other circuits provide similar local rules. *See*, 3rd Cir. R. 21(4), *Matute v. Procoast Navigation, Ltd.*, 928 F.2d 627 (3rd Cir. 1991). All circuits agree that

the decision to dismiss an appeal is discretionary. *Stotler & Co. v. Able*, 837 F.2d 1425 (7th Cir. 1988); *Barber v. American Security Bank*, 841 F.2d 1159 (D.C. Cir. 1988); *In Re: Beverly Manufacturing Corp.*, 778 F.2d 666 (11th Cir. 1985). Such circuit court rules are designed to enable appellate courts to process effectively and judiciously an ever-increasing workload. As the decisions in the more recent cases indicate, the number of appeals filed per judge has swelled dramatically. Thus, the pragmatic considerations that motivated the court of appeals' dismissal of the appeal are even more compelling in 1992. The court of appeals efforts to provide speedy and just dispositions of appeals for every litigant are hindered by a party that fails to abide by the court's rules for the timely filing of briefs.

Although dismissal of an appeal may not be appropriate in every case of an untimely filing, there was no showing in this case of "extraordinary and compelling circumstances" that could have given the court cause to excuse the violation. *Barber v. American Security Bank*, 841 F.2d 1159, 1160 (D.C. Cir. 1988). Here, Petitioner's counsel of record received notice of the briefing deadline and offered no explanation for his failure to comply. The excuse that Petitioner's "appellate" counsel (Roberts) had not received the October 1 notice to Scherr is disingenuous because Scherr and Roberts were co-counsel, and Roberts did not become a designated co-counsel until after the briefing notice had been delivered to Scherr. Even under Petitioner's characterization of the record, Scherr was counsel of record during the entire period of the case and was therefore obligated to file his client's

brief in a timely manner. No excuse is offered for Scherr's failure.

The notice of the brief due date was delivered to Jones' counsel, Scherr, in the October 1, 1991, briefing notice. The clerk of the court of appeals fulfilled his obligation to inform counsel of record (and the counsel who had filed the Notice of Appeal) that the brief was due on November 11, 1991. The clerk also used the briefing notice to inform Jones that failure to comply with the briefing schedule was cause for dismissal under Rule 42.3.2. Jones offered no explanation to the Fifth Circuit for her counsel's failure to comply with the court's rules. The court of appeals correctly dismissed Petitioner's appeal for Petitioner's failure to file her brief on time, or to provide any credible excuse for her failure.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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June 10, 1992